No. 1176

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IN THE

Supreme Court of the United States

October Term, 1963

UNITED STATES OF AMERICA, *ex rel.* CHARLES EVERETT,

Respondent,

—against—

ROBERT E. MURPHY, Warden,
Auburn State Prison,
Auburn, New York,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Robert E. Murphy, Warden of Auburn State Prison, Auburn, New York, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 19th, 1964 reversing the denial of an application for a writ of habeas corpus.

History

The judgment to which the petition for the writ was addressed was entered in the former County Court of Kings County, New York, on May 10, 1960. By it respondent was

convicted of the crime of Murder in the First Degree committed during a robbery in the killing of Carmelo Finocchiaro. The jury, according to Section 1045-a of the Penal Law recommended that respondent be imprisoned for the term of his natural life. Although such recommendation was not mandatory upon the trial court it, nevertheless, and acting according to the recommendation, sentenced respondent to imprisonment for the term of his natural life (703).*

The judgment of conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department (*People* v. *Everett*, 14 A.D. 2d 555), with Pette, J. dissenting upon a ground not pertinent to the issues here. The New York Court of Appeals affirmed (*People* v. *Everett*, 10 N.Y. 2d 500). In a concurring opinion, Fuld, J., stated that in his view the conviction should be reversed because a confession obtained "during a period of illegal detention following an unlawful arrest" should not have been admitted in evidence. Judge Fuld, however, deemed himself concluded by the rejection of his position in *People* v. *Lane*, 10 N.Y. 2d 347, (*People* v. *Everett*, 10 N.Y. 500 at p. 510). This court denied certiorari, Douglas, J., believing that certiorari should have been granted (*Everett* v. *New York*, 370 U.S. 963).

Respondent then applied to the United States District Court for the Northern District of New York for a writ of habeas corpus. The petition was based upon a claim of coercion in the procurement of the confession admitted in evidence upon respondent's trial in the state court. The

* The appeals were heard on the court reporter's trial minutes and the numerals herein refer to the page number of said minutes, a copy of which will be made available to the court if desired.

District Court, Brennan, J., found respondent's confession voluntary and denied a writ, the court having found that the trial record submitted was sufficient to enable it to make an independent examination of the contentions raised by the respondent in the petition then before the District Court (see memo decision dated August 15, 1962, Brennan, J. and appended hereto).

Upon appeal to the Court of Appeals for the Second Circuit, the order of the District Court was reversed, the court having made an independent finding that a "confession induced by police falsely promising assistance on a charge far less serious than the police knew would actually be brought is not to be considered a voluntary confession." (See opinion dated March 19, 1964 hereto annexed as an appendix).

Jurisdiction

The jurisdiction of the District Court was invoked by the respondent under Title 28, Section 2254, United States Code. The jurisdiction of this court is invoked by petitioner under Title 28, Section 2101c and d, United States Code, and Rule 22 of the revised rules of this court effective July 1, 1954.

Question Presented

Petitioner contends that the United States Court of Appeals erred in its judgment holding inadmissible in evidence confessions made by respondent to police officials and the District Attorney of Kings County upon the ground that his right of due process had been violated as a matter of law because these confessions were tainted by various

coercive practices. It is petitioner's contention that the confessions were voluntarily made and, therefore, constitutionally admissible in evidence against respondent.

Applicable Constitutional and Statutory Provisions

(1) Constitution of the United States, Fourteenth Amendment, Section 1:

> "* * * Nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

(2) Constitution of the State of New York, Article 1, Section 6:

> "* * * Nor shall he be compelled in any criminal case to be a witness against himself; * * *

> No person shall be deprived of life, liberty or property without due process of law."

(3) Code of Criminal Procedure of the State of New York (a) Sec. 395:

> "Confession of defendant, when evidence, and its effect.

> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

(b) Sec. 165:

"Defendant, upon arrest, to be taken before Magistrate.

The defendant must in all cases be taken before the Magistrate without unnecessary delay; and he may give bail at any hour of the day or night."

Record Facts Material to the Question Presented

The People's Case

Carmelo Finocchiaro resided with his daughter in Ozone Park, New York (93). On July 3, 1959 he left the Ozone Park premises at about 8:30 o'clock A.M. to go to business, having first placed upon his wrist a watch (94) which was a Longine Wittnauer time piece (96, 98; Peo. Ex. 4). The watch had been previously repaired (98) in early January 1958 and brought to Anthony Jewelers (106), a watch making firm operated by Anthony Testa (111), by whom it was repaired (113) on January 8, 1958 (114). As was his practice Mr. Testa etched in the watchcase his private number "A.J. 1503." This number corresponded with the number contained in a record. It showed the case number of the watch repaired to be 5162525 (116). It was People's Exhibit 4 (112). The same watch had been pledged for a loan at Sayer's Pawnshop on July 3, 1959 as indicated by its case number 5162525 (125). It had been pledged at midday for $10.00 by respondent who signed an application for a loan (126); using the name Charles Brown (Peo. Ex. 6).

Carmelo Finocchiaro was a contractor in children's sportswear, transacting his business on the fourth floor of 661 Broadway in Brooklyn (15).

On July 3, 1959, Irving Bailey, a dress manufacturer, visited his contractor, Hanna Mae (86), which firm was located at 661 Broadway, Brooklyn. He was to pick up some dresses and entered the building between 9:30 and 10 o'clock A.M. He reached the Hanna Mae Dress Company loft, located on the third floor, by elevator. After waiting to take care of his business at Hanna Mae, Mr. Bailey left the third floor loft at approximately 11:30 o'clock A.M., returning to the street level by elevator (87). The elevator door was blocked by a man's foot, and upon pushing and forcing the door, Mr. Bailey succeeded in emerging from the elevator. He saw a man, later identified as Carmelo Finocchiaro, lying beside the elevator door (8) bleeding from the head (89). When Patrolman John Leon arrived at 11:50 o'clock A.M. (90) an ambulance was called and Mr. Finocchiaro was removed to Wyckoff Heights Hospital (92). Mr. Finocchiaro, while in a semicomatose condition entered the emergency room at about 12:15 P.M. He was bleeding from lacerations of the scalp, the left ear and the left nostril. He was brought to the operating room at 3:30 o'clock P.M. where an operation was performed upon his head (103). He died the following day (104).

Detective Edward O'Connor was in charge of the investigation with respect to the death of Carmelo Finocchiaro. On July 14, 1959, Detective O'Connor took, from Saver's Pawnshop, an application for a loan (Peo. Ex. 6) and a watch (139, Peo. Ex. 4). The following day he obtained possession of a check (Peo. Ex. 3) at 661 Broadway (138). The check was obtained from Chester Finocchiaro, the son of the deceased. Detective O'Connor brought both documents to the police laboratory.

At about 10:30 o'clock P.M. on July 15, 1959 Detective O'Connor stationed himself across the street of premises 226 Bainbridge Street. There he saw respondent (140). He was approached by Detective O'Connor who asked him if his name was Charles Everett. He denied his name was Everett and declared his name to be "Charles Brown". Detective O'Connor said, "Don't kid me * * *", "I have a warrant from the Domestic Relations Court" (141). There was no warrant. Detective O'Connor called for a squad car which arrived at about 11:00 o'clock P.M. Respondent was driven to Brooklyn East Homicide Squad where they remained for a few minutes (345) then proceeded to the 87th squad (143), where respondent's interrogation was commenced.

Detective O'Connor showed respondent the application for the loan (Peo. Ex. 6) and asked him if it contained his signature. Respondent said the signature "Charles Brown" was his. He used that name since he was living with a woman named Alice Brown (354). Respondent was also shown the wrist watch (Peo. Ex. 4) which, he said, he had won in a "crap game" (355) on July 1, 1959. Respondent did not remember any of the other players who participated in the game of dice (356). Respondent was informed by Detective O'Connor that the wrist watch was taken from the wrist of Mr. Finocchiaro together with $80 on July 3 after he had been hit on the head in the hallway of 661 Broadway. Detective O'Connor added that Mr. Finocchiaro was then in the station house and had not been hurt too badly (357) and that "if you want me to help you out, you had better tell me the truth" (358). While respondent persisted in his denials of any implication in the assault Detective O'Connor said he would talk to Mr. Finocchiaro and return and "if he tells me you did it, I am not

going to help you out when I go to court." Detective O'Connor left the respondent and returned a short while later. Respondent was told that Mr. Finocchiaro said it was respondent who assaulted him and "unless you tell me the truth, I'm not going to help you." Respondent determined to tell the truth (358). The entire conversation between respondent and Detective O'Connor consumed approximately an hour or an hour and fifteen minutes (363).

Detective O'Connor was told by respondent he went to 661 Broadway Brooklyn, where he had at one time been employed, on July 3, arriving there at about 9 or 10 o'clock in the morning. He loitered around the building waiting for Mr. Carmelo Finocchiaro to arrive. During this waiting period he saw a young boy, another man and other people (358, 374, 375). While waiting Mr. Finocchiaro arrived. After the lapse of a few minutes respondent went, by elevator, to an upper floor where he saw Mr. Finocchiaro asking him for work (376). There was no work as the firm was closed for vacations. Respondent returned to the street floor deciding, in the meantime, "to rob" Mr. Finocchiaro. Respondent walked out of the building where, on the street, he found a stick about twenty-four inches in length and approximately two inches thick. It was "about a two by two". Respondent returned to the building where he waited for Mr. Finocchiaro (359, 378). Sometime later respondent saw Mr. Finocchiaro, through the elevator window, going down the elevator. Respondent hid behind the elevator door. When Mr. Finocchiaro stepped from the elevator he was struck twice on the head by respondent. He said, "I held the stick over my left shoulder and I could not take a good swing because there was a pipe in the way. When Mr. Finocchiaro fell to the floor he saw respondent. The latter, fearing recognition, again struck Mr. Finoc-

chiaro. Respondent took a wrist watch and wallet from the person of Mr. Finocchiaro and walked out of the building. Respondent discarded the stick in a trash can. He pawned the wrist watch for $10 at Saver's Pawnshop. He retrieved the sum of $80 from the wallet and discarded it (360, 380). Detective O'Connor took from respondent an identification card (Peo. Ex. 9) and had respondent write on a sheet of yellow paper (361; Peo. Ex. 10). Detective O'Connor's conversation with respondent terminated between 2 and 2:30 A.M. At 5:30 A.M. an assistant district attorney was called (362).

In the statement taken by an assistant district attorney on July 16, 1959 respondent reiterated his guilt of the crime (335, 385).

On the morning of July 3, 1959 respondent was seen in the hallway of 662 Broadway, the building in which Mr. Finocchiaro maintained his shop (14). He was seen by Donald Carbone and by a fourteen year old boy, Elmer Rodriguez (50, 76, 79, 82). Carbone exchanged greetings with respondent (51). The latter was wearing a brown straw hat (52, 80) and tinted glasses (53, 85) which he was still wearing during the trial (53).

Joseph P. McNally attached to the New York City Police Department Laboratory testified as a handwriting expert. He made comparisons of the handwritings on People's Exhibit 10, appearing on a yellow sheet of paper (361); People's Exhibit 3, which was a check given to respondent by the Finocchiaro firm while employed by it and endorsed "Charles Everett" (18); People's Exhibit 6, the application for the loan (126, 138, 154) at Saver's Pawnshop upon which appeared, in addition to other handwriting, the sig-

nature "Charles Brown"; People's Exhibit 9, which was an identification card taken from the person of respondent (361, 368). Testifying as a handwriting expert Officer McNally declared the papers were written by one and the same person. Specifically, the signature "Charles Brown, 345 Putnam Avenue" appearing on the application for a loan on People's Exhibit 6; the entire writing appearing on People's Exhibit 9; all the writing on People's Exhibit 10; and the signature or endorsement "Charles Everett" on People's Exhibit 3 (369).

The Voir Dire

Upon the trial respondent contended the statements made to Detective O'Connor and the assistant district attorney were coerced and involuntary.

Testifying on the *voir dire* respondent said he was thirty-eight years of age (174). He had been previously convicted in 1943 for the crime of housebreaking having been sentenced to a term of six to eight months; in 1946 he was convicted of unlawful entry receiving a sentence to the New York City Penitentiary; and in 1948 he was convicted of the crime of burglary in the third degree and sentenced to Sing Sing Prison for a term of five to six years.

On July 15, 1959 he saw Detective O'Connor at about 10 o'clock P.M. standing on the other side of the street opposite 226 Bainbridge Street, respondent's residence. Detective O'Connor, while "patting his gun" asked respondent if he were "Charles Everett" and added if he knew what "this" was. Respondent responded that he was Charles Everett and knew Detective O'Connor had a gun. The latter said "don't try to run out, I don't want to have

to use it". Respondent said, "I am not running away". When Detective O'Connor said "let's go" respondent suggested that he get this hat and coat. Both proceeded to respondent's apartment where he did get a hat and coat. Detective O'Connor used the telephone. Both returned to the street where, after a five minute wait, an automobile arrived. Respondent, O'Connor and three other detectives were in the vehicle. They stopped first at one police station where respondent voluntarily surrendered a knife he had been carrying. After five or ten minutes at the police station Detective Bulger, for the first time, placed handcuffs on respondent's wrists after which they proceeded to the Herbert Street Station, it is the 87th precinct. Respondent was seated at a table when Detective Bulger started to question him. They spoke about respondent's job and family for a while. Respondent stated that at one time he worked for Thomas (Carmelo Finocchiaro was also known as Tom), at 661 Broadway, Brooklyn, leaving the job by reason of its inadequate pay. He left the job in July or August 1958 and had not returned to premises since. Detective Bulger showed respondent a card, a stub from a pawn ticket, upon which was signed "Charles Brown" by respondent. Although he resided on Bainbridge Street the address appearing on the application for the loan was Putnam Avenue. When shown a wrist watch, respondent said he received it from a fellow with whom he had been gambling. Respondent did not know the man's name except that he was tall, dark and thin. Respondent said he "pawned" the watch on July 3, 1959 at Sayer's Pawnshop. Detective Bulger had respondent remove his shoes, then return them to him with the remark "you're wearing $25 shoes". They reviewed respondent's criminal record.

Suddenly, Detective Bulger said "You're keeping me up. When I gets mad, no telling what I'll do". Detective O'Connor was in the room and advised respondent to tell the truth. He denied hitting the old man. Detective Bulger handcuffed respondent with his hands behind his back and took him into a room in which there were three beds. The door was closed. Detective Bulger repeated "Everett, now I told you out there when I gets mad, no telling what I'll do". He asked respondent if he hit the old man as he left the elevator. Respondent denied it. Detective Bulger stepped on respondent's foot and beat him on the head and shoulders with a telephone book. He was struck with a black jack by Detective Bulger who while striking respondent said, "One for the old man, one for the old lady * * * " repeating it three times. Respondent fell to the floor where he was kicked in the leg and backside accompanied by threats of further assaults. Detective Bulger also declared he would shoot the respondent then say he was trying to escape. Four other detectives came into the room all of whom, with the exception of Detective O'Connor, beat him. They threw him against the screen window and beat him with their fists in the back of the neck. He was beaten with blackjacks in the stomach, the back of the neck and the side of the head. Respondent thereupon said "Don't kill me. Don't kill me. I did it". He was returned to the office where his handcuffs were removed and where he was given coffee and a doughnut. Respondent added that if it were not for the beating administered to him he would not have admitted striking the old man and taking his watch and wallet. Respondent said the statements he made to the detectives were not true.

Respondent summarized his testimony with respect to the beating. He said "Well, he only beat me on the head with the telephone book and back of the neck with the blackjack and my stomach with his fists and kicked me on the leg and stomped me on the foot."

Respondent said that while he was questioned by an assistant district attorney, Detective O'Connor and another detective were in the room. Detective Bulger was at a desk writing. The statement of respondent was not freely or voluntarily made as he was in fear. The statement to the district attorney was also false.

Respondent declared he reported the beating he had received at the hands of the detectives to a clerk at the jail. About a month after incarceration respondent also complained about his foot upon which a toenail "was coming off". An ointment was prescribed.

Respondent's record was produced from Raymond Street Jail. It was dated July 16, 1959 and showed the physical findings of respondent to be good. Respondent complained of a laceration of the right shin bone and hurt wrists.

Respondent was examined by the jail physician on July 16, 1959, when he found respondent to have an abrasion of the right shin bone and no other injuries. Respondent made no complaints with respect to the back of his neck or toe nail and respondent was not treated for a damaged toe nail. An ointment had been prescribed for respondent who was suffering from athlete's feet. Respondent made no complaint to the officer in charge of the Felony Court Pen; the magistrate; or the assistant district attorney who took the statement.

To meet respondent's assertions of coercion the people called a number of witnesses. Detective O'Connor stood in the doorway at a point opposite 226 Bainbridge Street on July 15, 1959, arriving there at about 10:30 o'clock P.M. He saw respondent emerge from 226 Bainbridge Street and stand in the doorway of the premises. Detective O'Connor accosted respondent and asked him if he were Charles Everett. Respondent responded he was Charles Brown. They proceeded to respondent's apartment where they remained for approximately twenty minutes or one-half hour during which time Detective O'Connor made use of the telephone to call Brooklyn East Headquarters. Respondent's premises were not searched and the "case" was not discussed. After returning to the street a squad car arrived with detectives Tomlinson and Elliott of the Brooklyn East Homicide Squad. Detectives O'Connor and Elliott sat with respondent in the rear seat of the car and Detective Tomlinson was the driver. They drove to Brooklyn East Homicide Squad where they remained for a few minutes then proceeded to the 87th Squad at Herbert Street arriving there between 11:30 o'clock P.M. and Midnight. Respondent was taken to the squad room and placed in a detention cage (149, 160) for about ten or fifteen minutes. No one, up to this point, spoke to respondent about the case. He was taken into the commanding officer's room where the only persons present were respondent, Detective O'Connor and Detective Bulger. The latter took no part in the interrogation of respondent. On one occasion he advised respondent to tell the truth. On another occasion the commanding officer also advised respondent to tell the truth. At one point respondent's shoes were taken from him for a laboratory analysis. O'Connor was the only

person who questioned respondent as it was Detective O'Connor's case who was responsible for its solution. Detective Bulger, who was never alone with respondent, did not stomp on respondent's foot. Detective O'Connor left respondent only once for a period of five minutes. Detective O'Connor did not hear Detective Bulger say to respondent he was keeping Bulger up, nor O'Connor hear Bulger accuse respondent with hitting the man. Respondent was not handcuffed with his hands behind his back nor was he taken into the dormitory.

The interrogation of the respondent started at approximately 1 or 1:30 A.M. although it could have been as early as 12:20 A.M. At the commencement of the interrogation, and for a period of about fifteen minutes, respondent denied any implication in the commission of the crime. Within forty-five minutes to one-hour after the interrogation began, respondent completed making his statement involving himself in the commission of the crime. The statement was completed between 1 and 2 A.M. Detective Bulger did not hit respondent on the head with a telephone book, nor strike him in the stomach or any other part of the body. Detective O'Connor did not have a blackjack nor did he carry one. He did not see a blackjack in the possession of Detective Bulger and he did not strike respondent with one. Detective O'Connor added he would restrain anyone from striking his prisoner. At no time did Detective Bulger threaten to shoot respondent then accuse him of trying to escape. Respondent did not accuse Detective Bulger of attempting to kill him or say that he would confess to "anything you want". The dormitory at the 87th squad was approximately ten or twelve feet from the fingerprinting

board and when respondent was drying his hands he was practically in the dormitory hallway.

Detective Bulger, attached to the Brooklyn East Homicide Squad, was at his office on July 15, 1959 when, at between 10 and 11 o'clock P.M., Detective O'Connor arrived with a prisoner. It was the respondent. They proceeded to the 87th squad offices arriving there at about midnight. Detective Bulger and Sergeant Mullane went in one car. At the 87th squad Detective O'Connor placed respondent in a cage. At about 1:30 o'clock A. M. Detective O'Connor started the interrogation of respondent with respect to the homicide of Carmelo Finocchiaro. Approximately twenty minutes after such interrogation started respondent admitted the assault upon the deceased. Respondent was not struck by Detective Bulger, who neither carries nor owns a blackjack. At no time was respondent taken into the dormitory.

Inspector Panarella, arrived at the 87th squad after respondent. The inspector did not strike respondent nor did he see anyone strike him with a telephone book, blackjack or fist. He saw respondent in the commander's office with Detectives O'Connor and Bulger. Inspector Panarella asked respondent no questions.

On July 15, 1959 Detectives William Elliott and Thomas J. Tomlinson met Detective O'Connor and respondent at Bainbridge Street and Reid Avenue after which they all proceeded to the Brooklyn East Homicide Squad office. After remaining there approximately four or five minutes they proceeded to the 87th Squad. Sergeant Diefenbach rode in his own vehicle. At the 87th Squad respondent was

placed in a cage for a few minutes. Respondent was never taken into the dormitory of the 87th Squad nor was he assaulted in any way by any of the detectives. Detective Elliott, who does not carry a blackjack, did not question respondent nor did Detective Tomlinson.

Sergeant John Diefenbach was the commanding officer of the 87th Squad. On the evening of July 15, 1959 he was at the Brooklyn East Boro office, a room on the same floor of the Brooklyn East Homicide Squad, when Detectives O'Connor, Tomlinson and Elliott arrived with respondent. They all went to the 87th Squad arriving there at about Midnight. Respondent was brought into the commanding officer's office. Respondent was never in the dormitory, the doors of which are always kept open. Sergeant Diefenbach did not strike respondent with a telephone book, a blackjack or his fists. He did not see any other officer assault respondent. Sergeant Diefenbach does not carry a blackjack. He took no part in the interrogation of respondent except on one occasion when he told respondent to tell the truth. Sergeant Diefenbach was advised by Detective O'Connor between 1:45 and 2 o'clock A.M. that respondent had confessed.

Leon Port, an assistant district attorney, received a call from the 87th Squad at about 5:40 A.M. on July 16, 1959 and arrived at the 87th Squad to take a statement at about 7 A.M. He received no complaint from respondent that he had been beaten with a phone book, blackjack or fists, nor did the assistant district attorney see any marks of an assault on the person of the respondent.

Nat Marshall testified he was the owner of the building 226 Bainbridge Street where respondent rents two rooms

paying $18 a week. On July 3, 1959 respondent paid him the rent sometime in the afternoon of that day. It was not at 11 o'clock A.M. When respondent paid the rent the witness had not been painting. The last time that he did any painting was around Christmas of 1958.

The Defense

Respondent testified in his own behalf. He attended school at Tarhobo, North Carolina, reaching the fifth grade of elementary school. In June and July 1959 he resided at 226 Bainbridge Street living with one Alice Brown. He assumed the name Charles Brown. On the night of June 26, 1959 he was playing cards at 454 Hancock Street with several people. He was successful in winning during the game, lending money to William Sephus and buying drinks for everybody. He also loaned some money to Mrs. Millie. At the conclusion of the game respondent had in his pocket the sum of $250. One of the participants in the card game asked respondent if he would lend $10 on the watch (Peo. Ex. 4) intending to redeem it from anticipated winnings. Respondent gave to "the man" $10 for the watch and placed it in his, respondent's, pocket. The watch was not redeemed that night. The transaction took place the morning of June 27. Upon arriving home he gave Alice Brown $172 to keep for him and also gave her $50 for her personal use. He kept $20 in his pocket. He had been playing cards on July 3.

On Friday, July 3 respondent did not work, having concluded his employment at Sol's Hardware on June 26. On the said date of July 3 respondent said he was at home until

11 o'clock A.M. when he went to his landlord and gave him a $20 bill for the rent. The landlord was painting and had a paint pail in his hand. The rent was $18. He gave his "landlord's son" the $20 bill who was instructed to give Mr. Brown two dollars change. The boy returned with the $2, gave it to the landlord who, in turn, gave it to respondent. After he left his landlord he went to the laundry, then to the Bell Telephone Company to order a telephone. He left $30 with the telephone company. He proceeded to Saver's Pawnshop where he asked the pawn broker for a loan of $20 on the watch which he had received the morning of June 27, 1959. The pawn broker offered him half. Respondent used the name "Charles Brown" and an address, 245 Putnam Avenue, Brooklyn on this pledge. The reason respondent gave for using the address he did was, "I didn't know the fellow's address, so I put it in that name and address". Respondent knew no one at the Putnam Avenue address. He just picked any address. He lost the stub he received from the pawn broker when the coat he had placed it in was given to the cleaner.

Respondent testified that he had been employed at 661 Broadway until 1958 and never returned to the premises. He was not at the premises on July 3, 1959. He never saw Mr. Finocchiaro nor had he asked him for a job on July 3, 1959, nor strike him with a piece of wood. Respondent did not steal Mr. Finocchiaro's wrist watch or wallet.

On cross-examination respondent reiterated that he was in the card game which commenced on June 26 and ended on June 27. He did not know the name of the man from whom he had received the watch as security for $10. He made no inquiry with respect to that man who was to re-

deem the watch. Although respondent still had $172 credit with his girl-friend on the morning of July 3 he was in need of money. When he went to Saver's Pawnshop he used "a phony name" and a "phony" address. On July 3, 1959 respondent went to Koski's Pawn Shop when he redeemed a watch, a fan and three suits. One of the suits he repledged.

Respondent declared that everything he told the detectives and the assistant district attorney was false. Respondent asserted that the answers made to the questions of the district attorney were also false and had been suggested by the detectives. On other occasions the answers attributed to him were not made or he had no recollection of the event.

William Sephus testified he knew respondent and, on occasion, played cards with him. On June 26, 1959 at 454 Hancock Street he played cards with respondent who won quite a bit that night. It appeared to the witness that respondent won $25 or $30.

General Pettaway testified he lived at 454 Hancock Street and he knew that people played cards in the apartment of Mr. Robinson located at the top floor of the premises. He saw respondent the morning of June 27, 1959.

Alexander Lucas said he saw respondent on the evening of June 26, 1959 at 454 Hancock Street where there was a poker game in progress. There were four or five persons in the game. He saw some paper currency in front of respondent where he was playing cards stacked about four inches tall. He went to a bar with respondent who paid for the drinks.

Millicent Isina Edwards said that on the morning of June 27, 1959 she saw respondent at the apartment of Henry Robinson at 454 Hancock Street where there was a card game in progress. She saw respondent winning in the card game.

Martin Luther Harrell, a clerk at Koski's pawn broker said that on July 3, 1959 respondent redeemed, at his place of business, an electric fan, a man's wrist watch and two suits, paying therefor the sum of $58.85. Respondent immediately repawned one of the suits and received the sum of $10 redeeming it on July 13.

Proceedings in the New York Court of Appeals

On the appeal to the New York Court of Appeals from the judgment of conviction respondent raised two points which are here pertinent. One was entitled: "Defendant was illegally arrested, illegally detained, illegally fingerprinted, and subjected to the illegal search of his home and the illegal seizure of his property." The Court of Appeals, by its unanimous affirmance of the judgment, rejected this factual claim after its careful scrutiny of the entire record pursuant to its constitutional power in capital cases (New York State Constitution, Article VI, Section 7). As heretofore noted, Fuld, J. felt compelled to concur in the court's finding that a confession obtained from a defendant is admissible although it was procured "during a period of illegal detention following an unlawful arrest," (*People* v. *Everett*, 10 N.Y. 2d 500, 510), Judge Fuld having previously expressed his contrary views in *People* v. *Lanc*, (10 N.Y. 2d 347).

The second point was entitled: "Defendant's confession was obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, and Article I, Section 6, of the Constitution of the State of New York, and should have been excluded as a matter of law."

ARGUMENT

POINT I

The petition for the writ of habeas corpus was properly denied on the merits. Respondent failed to sustain the burden of proof cast upon him by law.

Respondent's contention in the Federal Courts were identical with his arguments in the State Court of Appeals, resolving themselves into the assertion that his rights to due process under the applicable provisions of the 14th Amendment to the Federal Constitution were violated by the admission into evidence of the confessions made by him.

The unanimous affirmance of the judgment of conviction by the State Court of Appeals and the dismissal by the Federal District Court of the petition for a writ of habeas corpus left the respondent with but one recourse in the United States Court of Appeals of which he has availed himself in full measure and with complete success: To contend that the jury which found him guilty, New York's Court of Appeals and the Federal District Court all erred so completely in their treatment of his confessions that the United States Court of Appeals, sitting in fact as a jury, must reverse. The persuasiveness of this argument is, of course, shown by the judgment of the Court of Appeals in

reversal of the District Court. It is our submission that the error of this reversal is patent.

Respondent says he was illegally taken into custody when Detective O'Connor, claiming to have in his possession a warrant of the domestic relations court, asked respondent to accompany him. It was for the respondent to comply or refuse to comply with the request. It was also for respondent to demand the production of the warrant to determine for himself whether or not to resist arrest. (*People* v. *Marendi*, 213 N.Y. 600, 608; *People* v. *Cherry*, 307 N.Y. 308, N.Y. Code Crim. Pro. Sec. 180). The officer had, in fact, no warrant. In this posture of the case, however, a felony having been committed, O'Connor was sufficiently fortified with facts giving him reasonable cause for believing respondent had committed the homicide (Code Crim. Pro. Sec. 177). A wrist watch, conclusively shown to have been the property of the deceased, had been pledged for a loan the same day of the homicide. It was committed sometime prior to 11 A.M. of July 3, 1959, and the watch was hypothecated at midday of the same day. The application for the loan was signed in the same handwriting as the handwriting which appeared on the endorsement of a salary check of respondent which had been given him sometime before while employed by the firm of the deceased.

The New York Statute (Code Crim Pro. Sec. 177) permits an arrest by a peace officer without a warrant when a felony has in fact been committed and the peace officer has reasonable cause for believing the person to be arrested to have committed it. Although the peace officer is required to inform the person arrested of the cause of the arrest (Code Crim. Pro. Sec. 180) the failure to do so does not

affect jurisdiction (*People v. Eberspacher*, 79 Hun 410; *Albrecht* v. *United States*, 273 U.S. 1). The latter case observed (p. 8). "* * * a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in which it was made." Respected authority has declared. (*Wharton's Crim. Ev.*, 11th Ed. Sec. 610):

> "The mere fact that a confession is made while the maker is in the custody of a police, or even while confined under arrest, is not sufficient of itself to affect its admissibility, providing that it is otherwise voluntarily made. This rule pertains equally whether the arrest is legal or illegal."

It has been the law of the State of New York for many decades that a confession made while under arrest will not be excluded if otherwise voluntarily made (*Hendrickson* v. *People*, 10 N.Y. 13; *People* v. *Wentz*, 37 N.Y. 303; *Murphy* v. *People*, 63 N.Y. 590; *Balbo* v. *People*, 80 N.Y. 484; *Cox* v. *People*, 80 N.Y. 500; *People* v. *Kennedy*, 159 N.Y. 346; *People* v. *Garfalo*, 207 N.Y. 141; *People* v. *Trybus*, 219 N.Y. 18; *People* v. *Barbato*, 254 N.Y. 179; *People* v. *Spano*, 4 N.Y. 2d 256, rev'd on other grounds, 360 U.S. 315) This Court's attitude is the same (*United States* v. *Carignan*, 342 U.S. 36; *United States* v. *Mitchell*, 322 U.S. 65, rehear. den. 322 U.S. 770; *Crooker* v. *California*, 357 U.S. 433, rehear. den. 358 U.S. 858; *Gallegos* v. *Nebraska*, 342 U.S. 56; *Brown* v. *Allen*, 344 U.S. 443, rehear. den. 345 U.S. 946). It was observed in the *Cox* case (*supra*) at p. 515:

> "The confessions of the prisoner made at the station-house in Boston after his arrest to the police officer who arrested him, were properly admitted in evidence. The confession was not induced by any promise or threat and so far as appears was entirely vol-

untary. (*People* v. *Wentz*, 37 N.Y. 309). It is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put by him, or that it was made under hope or promise of a benefit of a collateral nature."

The New York Court of Appeals in the case at bar, reaffirmed the principle when it said (at p. 507):

> "The alleged illegality of the arrest is predicated on O'Connor's failure to comply with section 180 of the Code of Criminal Procedure. Whether defendant's detention was illegal or whether, as the People maintain when he was first taken to the police station for investigation he was not placed under arrest, the result is the same. The fact that admissions or a confession are obtained from a defendant during a period of illegal detention following an unlawful arrest does not, as a matter of law, render them inadmissible (*Stein* v. *New York*, 346 U.S. 156, 186-187; *People* v. *Alex*, 265 N.Y. 192, 194; *People* v. *Mummiani*, 258 N. Y. 394, 396; *People* v. *Trybus*, 219 N. Y. 18, 22; *Balbo* v. *People*, 80 N.Y. 484, 499). We recently reaffirmed this well-settled principle in *People* v. *Lane* (10 N.Y. 2d 347). The manner of the arrest and the subsequent detention are merely circumstances to be considered by the jury on the issue of voluntariness."

In holding that a confession secured during a period of illegal detention does not necessarily make it inadmissible under New York Law, this Court, in *Stein* v. *New York* (346 U.S. 156) said at pp. 187-188:

> "Petitioners confuse the more rigid rule of exclusion which, in the exercise of our supervisory power,

> we have promulgated for federal courts with the more limited requirements of the Fourteenth Amendment. This we have held, did not impose rules of evidence on state courts, which bind them to exclude a confession because, without coercion, it was obtained while a prisoner was uncounselled and illegally detained."

It is not, therefore, a question of due process (*McNabb* v. *United States*, 318 U.S. 332; *Stroble* v. *California*, 343 U. S. 181; *Lisenba* v. *California*, 314 U.S. 219; *Crooker* v. *California*, 357 U.S. 433; *Brown* v. *Allen*, 344 U.S. 443).

A timetable of the events concerning respondent's apprehension, custody, interrogation, and arraignment would clarify the circumstances with respect to the confession and show beyond doubt that it was made voluntarily. The time, of course, is approximate. Thus, the record shows:

July 15, 1959

10:30 o'clock P.M. Respondent accosted by Detective O'Connor at 226 Bainbridge Street (140-141).

11:00 o'clock P.M.: Squad car arrives in which respondent and Detective O'Connor are driven to the Brooklyn East Homicide Squad (158, 345).

11:05 o'clock P.M.: Respondent and several detectives proceed to the 87th Squad at Herbert Street (183, 286, 290).

12 midnight: Respondent, with detectives, arrive at the 87th Squad, respondent placed in a cage where he remained approximately 20 minutes (161, 299).

July 16, 1959.

1:00 o'clock A.M.: Interrogation of respondent commenced. After a lapse of 20 minutes respondent declared he would make a statement (161, 162, 321).

2:00 o'clock A.M.: Conversations between respondent and Detective O'Connor concluded and respondent "booked" (313, 362).

5:40 A.M.: District Attorney received message to proceed to 87th Squad and recorded, stenographically, the confession of respondent at 7 A.M. (335, 338).

Same morning: Respondent arraigned in Magistrates' Felony Court and pedigree taken by the jailor (240, 280).

Same day: respondent examined by physician at Raymond Street Jail (269).

It is apparent from the foregoing that respondent was in custody for a total of no more than fourteen and one half hours. Inclusive was the apprehension of respondent at Bainbridge Street; the wait for the arrival of the squad car; the drive to the Brooklyn East Homicide squad to meet with the commanding officers; the drive to the 87th Squad; the interrogation of respondent, his fingerprinting; the taking of a statement by the district attorney; respondent's arraignment before a City Magistrate and his eventual delivery into the custody of the Commissioner of Corrections of the City of New York.

With respect to the deception practiced upon respondent the New York Court of Appeals declared (10 N.Y. 2d 500, 507):

> "Likewise, defendant's claim that the deception practiced by O'Connor renders his confession inadmissible must fall under the well-settled law of this State. Almost a century ago, Chief Judge Davies stated that 'a confession is admissible, although it is * * * obtained by artifice or deception' (*People* v. *Wentz*, 37 N.Y. 303, 306). This rule has been reaffirmed by our court in *People* v. *Buffom* (214 N.Y. 53, 57); *People* v. *White* (176 N.Y. 331, 348-349). (See also, *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, cert. den. 350 U.S. 896; *State* v. *Exum*, 213 N.C. 16; *Commonwealth* v. *Johnson*, 372 Pa. 266, cert. den. 345 U.S. 959; 3 Wigmore, Evidence, Sec. 841). Deception alone will not render a confession invalid, unless the deceiving acts amount to a deprivation of due process (*People* v. *Leyra*, 302 N.Y. 253, 363). Defendant's reliance upon the *Leyra* case is misplaced, for in that case we found (p. 365) a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances and at the same time conducting an unrelenting interrogation of the exhausted accused.' We held the confession obtained by these means to be involuntary as a matter of law."

The use of artifice, fraud or deception will not operate to exclude a confession if the means employed are not calculated to procure an untrue or involuntary statement (*People* v. *Wentz*, 37 N.Y. 303; *People* v. *White*, 176 N.Y. 331; *People* v. *Scott*, 195 N.Y. 224; *People* v. *Buffom*, 214 N.Y.

53; *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, cert. den. 350 U.S. 896; *Jackson* v. *United States*, 102 F. 473; *Lewis* v. *United States*, 9 Cir. 74 F. 2d 173; *Young* v. *United States*, 107 F. 2d 490; *Simmons* v. *State*, 206 Miss. 535, 40 So. 2d 289; *State* v. *Hafer*, 238 Ia. 820, 28 N.W. 2d 475; *Jackson* v. *State*, 180 Md. 658, 26 A. 2d 815). A poignant observation was made in *Lewis* v. *United States* (74 F. 2d 173, 177), where the defendant was falsely advised that Indians "got off" more easily because they were Indians. The court said:

> "The most that can be said of it would be that it tended to relieve the Indian from fear of capital punishment, and thus make him more comfortable in an admission of guilt than he would have been without that knowledge. There was here neither promise, express or implied, nor coercion, direct or covert."

In the *Caminito* case (*supra*, 222 F. 2d 698) defendant's confession was somewhat induced, when two women and a man, police officers, each falsely pretended to identify him as the driver of an automobile used in a hold-up and killing. The court observed at p. 300:

> "Alone or together, neither the unlawful detention for many hours nor the deceit in confronting Caminito with disguised police officers who lied in identifying him would suffice to vitiate the confession as unconstitutionally obtained."

The confession of the respondent brought him into the vice of criminality. The deception (that the victim was still alive) led to an admission of the crime of robbery.

The test is whether it was a voluntary statement. It was observed in *Culombe* v. *Connecticut* (367 U.S. 568, 602):

> "Each of these factors, in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been over-borne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Rogers* v. *Richmond*, 365 U.S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

It has been consistently held that the employment of deception by law-enforcement officials, whether state or federal, does not violate any constitutionally protected right of the accused, except in extraordinary cases. In *Young* v. *U. S.*, 107 F. 2d 490 (5th Circ.), a federal officer disguised himself as a prisoner in order to overhear admissions by the accused in his cell. The Court held (p. 492):

> "That a deceit was thus practiced does not exclude what Young may have freely said to him. It all goes to the jury for them to consider its weight, under

caution by the Court that all alleged confessions are to be scanned with care and accepted with caution."

In *Leahy* v. *U. S.*, 272 F. 2d 487 (9th Circ.), cert. granted, 363 U.S. 810, cert. dism. 364 U.S. 945, federal agents posed as agents from the county assessor's office in order to gain entry into the accused's home. After conviction, the appellant argued the evidence obtained as a result of the arrest was inadmissible because of the asserted illegality of the arrest itself. The Court found there was no constitutional mandate forbidding the use of deception in an arrest, citing the language of the Supreme Court in *Sherman* v. *U. S.*, 356 U.S. 369, 372, that "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." Cf. *Bruno* v. *U. S.*, 259 F. 2d 8, 14 (9th Cir.), holding sale of narcotics to a deputy sheriff disguised as a narcotics peddler did not constitute entrapment absent "creative activity" by the law enforcement officials inducing the crime. Entrapment does not appear to be a defense at all in New York. (*People* v. *Mills*, 178 N.Y. 274, 289). If the police may lawfully entrap one into committing the crime itself, the use of entrapment in obtaining a confession may not be said to violate due process, absent the special circumstances found in *Leyra* v. *Denno*, 347 U.S. 556.

Commonwealth v. *Johnson*, 372 Pa. 266, 93 A. 2d 691, cert. den. 345 U.S. 959, sustained the use of a confession under facts quite similar to those at bar. There, just as here, confession was obtained by law-enforcement officials who created the impression to the accused that no deaths had resulted from his acts, which involved derailing a passenger train. The Court sustained the use of the confession, holding, 93 A.2d at 694:

> "Appellant also argues that his confessions were obtained through trickery and artifice in that he was not told of the deaths resulting from the displacement of the rail. It may be he might not have told what he did had he known of the deaths, but this does not affect or detract from the truthfulness of his admission that he displaced the rail. It is not claimed that the police officers or the district attorney made any misrepresentations to him concerning the facts and circumstances surrounding the crime. The complaint is that the defendant was not told of the seriousness of the offense as to which he was being questioned in the district attorney's office. Even if this were deemed artifice, it manifestly was not designed or calculated to obtain an untrue confession: according to the testimony of two of the police officers, the defendant prior to the written confessions made at the district attorney's office, volunteered that he had displaced the rail. 'The object of evidence is to get at the truth and a trick which has no tendency to produce a false confession does not render its truth less probable.'"

The very cases cited by respondent in the Court below underscore the insufficiency of his claim that the deception practiced on him rendered his confession—found by a jury to be fully voluntary—inadmissible as a matter of law. In *U. S. ex rel. Caminito* v. *Murphy, supra*, this Court barred the use of a confession extracted after the accused had been held incommunicado for forty hours, interrogated 27 hours, and stripped naked for a considerable time. All of these elements are totally absent from the case at bar. In *Caminito* this Court held that deception and unlawful detention, without more, do not vitiate a confession in a state prosecution; and, construing respondent's contentions most

broadly, deception and unlawful detention, without more, is exactly what we have here.

Likewise, *Leyra* v. *Denno*, 347 U.S. 556, involved far more than the deception by a detective on an experienced, mature accused which the instant record reveals. In *Leyra*, there was a flagrant abuse of the confidential doctor-patient relationship practiced on an accused who had been questioned almost constantly for 23½ hours. A concealed microphone was planted in the accused's room. Finally, a psychiatrist, posing as a medical doctor brought by the police to ease an attack of sinus suffered by the accused, employed "subtle and suggestive questions * * * to induce petitioner to admit his guilt." 347 U.S. at 559. There were, as the Supreme Court found, "days and nights of intermittent, intensive police questioning" which reduced the accused's "ability to resist interrogation * * * to almost trance-like submission by use of the arts of a highly skilled psychiatrist." 347 U.S. at 561. The instant case presents none of these elements.

The other cases cited by respondent shed little light on the issues at bar. *Haynes* v. *Washington*, 373 U.S. 503, dealt with 16-hour incommunicado detention and repeated denials of the accused's requests to call his wife and an attorney unless he "cooperated" by confessing. In the present case there is no showing that respondent ever even asked to call anyone once he was brought to the police station, and he was questioned for no more than three hours at most (160, 162). *Lynumn* v. *Illinois*, 372 U.S. 528, involved threats by police that if the accused did not "cooperate", *i.e.*, confess, state relief to her dependent children would be cut off and her children taken from her. The accused was a woman with

no previous experience with the criminal law. *U. S. ex rel. Williams* v. *Fay*, No. 27911, decided by this Court October 4, 1963, concerned an 18-year-old accused questioned almost continuously for eighteen hours by relays of police and told that his repeated requests to see his mother and a chaplain would be granted only if he confessed.

Similarly, *Spano* v. *New York*, 360 U.S. 315, involved the use by police of the childhood friend of the accused in repeated efforts to make him confess. This "friend" falsely told the accused his job was in jeopardy and pleaded with him that losing it would be "disastrous" to the accused's family, which included three children. 360 U.S. at 323. The accused was 25 years old and foreign-born, and had no prior arrests. He repeatedly asked to see his lawyer during the questioning, unlike the present case.

The evidence of coercion in these cases was far more substantial than in the case at bar. No matter how often respondent reminds us that he was arrested without a warrant and that Detective O'Connor told him Finocchiaro was alive, these two bare facts, in the light of all the circumstances including respondent's maturity and experience in arrests, fall far short of the showing which impelled the setting aside of the conviction.

Upon the trial, respondent's principal attack upon his confession was the use of physical violence used upon him in obtaining it. This plan of attack, although submitted to the trial jury, was abandoned in the Appellate Division of the Supreme Court of the State of New York and in the New York State Court of Appeals. The United States Court of Appeals, however, did not consider respondent's version since it was controverted by denials of physical violence.

We do not find here such a combination of circumstances as would condemn the confession as lacking in due process. "Due process does not demand of States, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt." (*Culombe v. Connecticut*, 367 U.S. 568, 588.) This Court, in searching the record, will look only at the undisputed facts and determine whether the judgment of guilt is constitutionally defective (*Thomas v. Arizona*, 356 U.S. 390, reh. den. 357 U.S. 944; *Payne v. Arkansas*, 356 U.S. 560; *Crooker v. California*, 357 U.S. 433, reh. den. 358 U.S. 858). We are confident that upon those facts respondent has failed to demonstrate federal jurisdiction (*Thomas v. Arizona*, *supra*; *Fikes v. Alabama*, 352 U.S. 191; *McNabb v. United States*, 318 U.S. 332). This Court's concern is one of "due process". This case is not encompassed within the definition of due process, where this Court said (*Lisenba v. California*, 314 U.S. 219, 236), "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

Such a question is not presented in this case.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Respectfully submitted,

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Attorney for Petitioner

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Of Counsel

APPENDIX

Memorandum Decision of Appellate Division Reported in 14 App. Div. 2d 555

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES EVERETT, Appellant.—Appeal by defendant: (1) from a judgment of the County Court, Kings County, rendered May 10, 1960, after a jury trial, convicting defendant of murder in the first degree, and sentencing him to imprisonment for the term of his natural life; and (2) from every intermediate order made in the action. Judgment affirmed. No opinion. No separate appeal lies from the intermediate orders, which have been reviewed on the appeal from the judgment of conviction. Nolan, P. J., Ughetta, Kleinfeld and Brennan JJ., concur; Pette, J., dissents and votes to reverse the judgment and to grant a new trial, with the following memorandum: The defendant stands convicted upon an alleged confession which in part admitted that he pawned a watch belonging to the decedent. As to that portion of the proof relating to the defendant's possession and pawning of the watch, the learned Trial Judge charged the jury that if they found defendant in recent and exclusive possession of the fruits of a crime and that if such possession was unexplained or falsely explained, they could draw the inference that the defendant "is the criminal." In marshalling the proof on this vital incident, the court narrated the defendant's explanation of how he obtained the watch, i.e., by taking it as collateral for a $10 loan to "unknown man" during a card game, and then went on to state: "If you find his testimony to be truthful and, gentlemen, you are the judges of the facts in this case, then he has explained his possession. He has met the requirements of the law on this point. On the

other hand, if you find that he did not explain his recent possession of the alleged stolen watch or that the explanation he gave was false, then under the law you do not have to, but you may draw an inference of the commission of a larceny by the defendant." To this portion of the charge, the defendant's trial counsel duly excepted. In my opinion, this portion of the charge was prejudicial to dant's possession of the watch, it was incumbent upon the People the burden of proof of establishing how the watch came into his possession. In the evaluation of the defendant's possession of the watch, it was uncumbent upon the Trial Judge to further instruct the jury that upon the proof adduced they had to decide the preliminary question of whether the defendant was the thief who bludgeoned the decedent to his death or was a mere receiver of stolen goods. As was said by CARDOZO, J., in *People* v. *Galbo* (218 N. Y. 283, 291) "as soon as evidence is offered that the theft was committed by someone else, the inference changes". However, the jury in this case was not informed that the defendant's version had shifted the inference covered in the charge, so that it remained incumbent upon the People to sustain their burden of proof to the extent that it was the defendant who was the thief who murdered the decedent. While the prosecution did not have to pursue this burden to a mathematical certainty, it was incumbent upon the court to charge that the prosecution, in seeking by circumstantial evidence to establish recent possession of the fruits of the crime, had to do so "by clear and convincing evidence * * * of such a character as, if true, to exclude to a moral certainty every other inference but that of recent and exclusive possession" by defendant. (*People* v. *Foley*, 307 N. Y. 490, 492-493.)

Opinion of Court of Appeals Reported in 10 N. Y. 2d 500.

FROESSEL, J. Defendant was convicted of murder in the first degree, and, upon the jury's recommendation, sentenced to life imprisonment. The evidence adduced at the trial may be summarized as follows:

At 11:30 on the morning of July 3, 1959, Carmello Finocchiaro was discovered lying on the ground floor of 661 Broadway, Brooklyn, New York. Upon the arrival of the police, Finocchiaro was found near the elevator, bleeding profusely from head wounds, and incoherent. He died in the hospital the following day. The cause of death was "a fractured skull, subdural and epidural hemorrhage".

On July 14 Detective Edward O'Connor, in charge of the investigation, went to Saver's Pawnshop, and found a Longine Wittnauer wrist watch which had been pawned on July 3, 1959, together with an application for a $10 loan signed by "Charles Brown". At the trial, decedent's daughter testified that she had seen her father wearing such a wrist watch when he left home the morning of July 3. It was also established that in January, 1958 decedent's watch had been repaired by Anthony Jewelers, and that the case number thereon corresponded to the number on the watch pledged at Saver's Pawnshop. The signature on the loan application was in the same handwriting as the indorsement on a payroll check, payable to a former employee of decedent, one "Charles Everett"; O'Connor received this check from decedent's son on July 15.

At 10:30 P.M. on July 15, Detective O'Connor approached defendant in front of 226 Bainbridge Street, where the latter was living with Mrs. Brown. When asked if his name was

Charles Everett, defendant replied it was Charley Brown. O'Connor said: "Don't kid me, I know you're Charles Everett. I have a warrant from Domestic Relations Court. Your kids are hungry; your wife left your kids", to which defendant responded "Hell, no." The detective in fact had no warrant.

O'Connor and defendant thereupon went upstairs to the latter's apartment, where O'Connor telephoned Brooklyn East headquarters and asked someone in the homicide squad to send an automobile. Two detectives called for O'Connor and defendant, and, after stopping for a few minutes at said headquarters, they drove to the 87th Precinct, arriving between 11:30 and midnight. In due course they were joined by four other police officers, who were interested in the investigation.

Defendant was taken into the commanding officer's room, where he was questioned by O'Connor and Detective Bulger, the latter asking only a few questions. O'Connor testified that when he showed defendant the loan application, the latter admitted the signature "Charles Brown" was his, but stated that he won the watch "in a crap game" on July 1, 1959. Defendant was unable to recall the names of the other participants. When shown the payroll check, defendant stated that it contained his signature, and that he had worked for Finocchiaro two or three years before.

O'Connor then told defendant that the watch and $80 had been taken from Finocchiaro, who had been hit on the head in a hallway at 661 Broadway on July 3; that Finocchiaro was not badly hurt and was at the moment downstairs; that O'Connor could control Finocchiaro; and that he would

fied defendant if the latter told the truth. When defendant denied having assaulted Finocchiaro, O'Connor left the room, telling defendant that he would speak to Finocchiaro. Five minutes later O'Connor returned and told defendant that Finocchiaro had said defendant had assaulted him. Defendant said "All right, I'll tell the truth." Defendant then admitted having robbed and assaulted Finocchiaro.

The substance of defendant's admissions to O'Connor and of a statement made by defendant to an Assistant District Attorney at 7:37 A.M., recorded by a stenographer, is as follows: On the morning of July 3, 1959 defendant went to Finocchiaro's shop at 661 Broadway, and asked Finocchiaro whether there was any work. On his way downstairs, after having been told there were no jobs, defendant conceived the plan to rob his former employer. He went outside, picked up a stick approximately 18 to 24 inches long and 2 inches thick, returned to the building and, when he saw Finocchiaro through the elevator window, hid behind the elevator door. When Finocchiaro stepped from the elevator, defendant struck him with the stick on the left side of his head. As Finocchiaro fell he looked up; defendant, afraid that he had been recognized, struck him again. Defendant took the wrist watch and a wallet, left the building, and deposited the stick in a garbage can. On his way to the subway, defendant, after removing $80, threw the wallet in a garbage can. He then went to Saver's Pawnship and pawned the watch for $10.

According to O'Connor, the entire interrogation of defendant with regard to Finocchiaro lasted at most an hour and 15 minutes; the testimony is conflicting on this point,

however, there being an indication that defendant was questioned about other matters after he admitted having robbed Finocchiaro.

In response to a hypothetical question, the assistant medical examiner who performed the autopsy on decedent's body testified that in his opinion a piece of wood, 18 to 24 inches long and 2 inches thick, if applied with sufficient force to the skull of an individual, either one time or repeated times, could produce the type of fracture of the skull, with subdural and epidural hemorrhages, that was found to be the cause of Finocchiaro death.

Two witnesses, one 14 years of age, testified to having seen defendant at 661 Broadway on July 3; the one stating, however, he "saw a man that looks like" defendant; the other, who saw defendant twice that morning, admitting he "just got a quick look".

Testifying in his own behalf, defendant stated that on June 26, 1959 he had been successful during a card game, and had received the Wittnauer watch as security for a $10 loan he had made to another player, whom he did not identify. Defense witnesses who testified that defendant played cards on June 26, did not refer to the wrist watch. Defendant further stated that at 11:00 A.M. on July 3 he gave his landlord $18 rent, after which he went to Saver's and pawned the watch. On rebuttal, however, the landlord testified that defendant had paid the rent sometime during the afternoon of July 3 and not at 11:00 A.M. Defendant denied having committed the crime, and stated that what he had told the detectives and the Assistant District Attorney was not the truth. He claimed the admissions

and statement had been obtained from him as the result of severe beatings.

All six detectives testified that defendant was not beaten. The Assistant District Attorney, who had taken defendant's statement, testified that he had received no complaint from defendant, and had observed no mark of violence on the exposed parts of defendant's body. Defendant made no complaint to the Magistrate who arraigned him on July 16, or to the officer in charge of the felony court pen. The jail physician, who examined defendant the same day, noted on the medical card that defendant's general condition was "good", and that there was "evidence or diagnosis of abrasion right shin bone, wrists appear normal". The doctor testified that defendant made no other complaint.

Over defendant's objection that they were "coerced and the result of the beatings which he got", the trial court received in evidence his admissions to Detective O'Connor and his subsequent confession. At the close of the *voir dire*, and again in his charge, the court carefully instructed the jury that the police officers' denials of the alleged coercion presented a question of fact for their ultimate determination. The jury was expressly instructed that it was the duty of the prosecutor to prove that the confession had been freely given, and that if they found it was not voluntary, or if they had a reasonable doubt as to whether it was voluntary, they were to disregard it. In addition, the court charged that unreasonable delay, if such was found, was a circumstance to be considered by the jury on the question of voluntariness. The conflict in the testimony raised a

question of fact which the jury resolved against defendant. The Appellate Division affirmed, and we have no right to disturb the finding of voluntariness implicit in the verdict.

Defendant contends, however, that, "Laying aside any question of police brutality", the "illegal arrest and fraud which produced defendant's confession required its exclusion" as a matter of law.

The alleged illegality of the arrest is predicated on O'Connor's failure to comply with section 180 of the Code of Criminal Procedure. Whether defendant's detention was illegal or whether, as the People maintain, when he was first taken to the police station for investigation he was not placed under arrest, the result is the same. The fact that admissions or a confession are obtained from a defendant during a period of illegal detention following an unlawful arrest does not, as a matter of law, render them inadmissible (*Stein* v. *New York*, 346 U. S. 156, 186-187; *People* v. *Alex*, 265 N. Y. 192, 194; *People* v. *Mummiani*, 258 N. Y. 394, 396; *People* v. *Trybus*, 219 N. Y. 18, 22; *Balbo* v. *People*, 80 N. Y. 484, 499). We recently reaffirmed this well-settled principle in *People* v. *Lane* (10 N Y 2d 347). The manner of the arrest and the subsequent detention are merely circumstances to be considered by the jury on the issue of voluntariness.

Likewise, defendant's claim that the deception practiced by O'Connor renders his confession inadmissible must fall under the well-settled law of this State. Almost a century ago, Chief Judge DAVIES stated that "a confession is admissible, although it is * * * obtained by artifice or decep-

tion" (*People* v. *Wentz*, 37 N. Y. 303, 306). This rule has been reaffirmed by our court in *People* v. *Buffon* (214 N. Y. 53, 57); *People* v. *White* (176 N. Y. 331, 348-349). (See, also, *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, cert. den. 350 U. S. 896; *State* v. *Exum*, 213 N. C. 16; *Commonwealth* v. *Johnson*, 372 Pa. 266, cert. den. 345 U. S. 959; 3 Wigmore, Evidence, §841.) Deception alone will not render a confession invalid, unless the deceiving acts amount to a deprivation of due process (*People* v. *Leyra*, 302 N. Y. 353, 363). Defendant's reliance upon the *Leyra* case is misplaced, for in that case we found (p. 365) "a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances and at the same time conducting an unrelenting interrogation of the exhausted accused." We held the confession obtained by these means to be involuntary a a matter of law.

The instant case, however, presents no such aggravating circumstances as would transform the deception practiced upon defendant by Detective O'Connor into a denial of due process. The admissions, although obtained following deception, could nevertheless be found to have been voluntarily made in the hope of securing O'Connor's intercession with Finocchiaro. Since they were freely given and were not the product of physical or mental coercion, they could be used against him (*Culombe* v. *Connecticut*, 367 U. S. 568, 602). No objection was made to the admissibility of the confession on the ground that it was procured by fraud. The court below properly charged the jury in this respect, and no exception thereto was taken.

We have examined the remainder of defendant's contentions and find them to be without merit or not saved for review. With one exception, they require no comment. The exception relates to the trial court's charge with respect to the inference which might be drawn from proof of recent and exclusive possession of the fruits of a crime. In this connection the court charged, virtually in the language employed by Judge CARDOZO in *People* v. *Galbo* (218 N. Y. 283, 290): "The Court of Appeals has stated that recent and exclusive possession of the fruits of a crime, if unexplained or if falsely explained, will justify the inference by a jury that the accused is the criminal." The court continued by instructing the jury that they were not bound to draw such an inference, but "may reject it, as you see fit". The court then proceeded to marshal the evidence in this respect and, after so doing, stated:

"If you find [defendant's] testimony to be truthful and, gentlemen, you are the judges of the facts in this case, then he has explained his possession. He has met the requirements of the law on this point.

"On the other hand, if you find that [defendant] did not explain his recent possession of the alleged stolen watch or that the explanation he gave was false, then under the law you do not have to, but you may draw an inference of the commission of a larceny by the defendant."

On this point, defendant relies on the dissenting opinion below, which stated that the court should have charged the jury that they had to decide whether defendant was the thief or merely a receiver of stolen goods, because "as soon

as evidence is offered that the theft was committed by someone else, the inference changes, and [defendant] becomes a receiver of stolen goods" (*People* v. *Galbo*, *supra*, p. 291). The dissenter felt that "defendant's version had shifted the inference covered in the charge", so that the burden remained upon the People to prove defendant was the thief who had murdered decedent.

It is clear that the court's charge that recent possession, if unexplained or falsely explained, justifies the "inference of the commission of a larceny by the defendant" was correct. This, as noted, is but a restatement of the language in *People* v. *Galbo* (*supra*) which has become the well-established law of this State. Moreover, in *People* v. *Spivak* (237 N.Y. 460, 461), where the defendant was indicted for larceny and receiving stolen property following his sale of an automobile which had been stolen a few days earlier, Judge CARDOZO, on the authority of the *Galbo* case, stated: "The defendant, having made the sale, should have explained the origin of his possession." It was therefore not error to have required of defendant an explanation of how the watch came into his possession. There was ample evidence from which the jury could have concluded that defendant's explanation was false; they were therefore entitled to reject the proffered explanation and draw the inference that defendant was the thief.

Upon the record before us and in the setting of this case it was impossible for the inference to have changed so as to make defendant a mere receiver, and it was thus unnecessary for the court to charge the jury that they might find defendant to be a receiver. The inference resulting from proof of recent possession of the fruits of a crime

does not change until "evidence is offered that the theft was committed by someone else" (*People* v. *Galbo*, *supra*). Here, the only evidence which might possibly have supported an inference that the theft was committed by someone else was defendant's explanation that he acquired the watch in a card game a week before the alleged larceny. If the jury were to have credited this explanation, defendant would not have been the thief who stole the watch or a receiver of stolen property, for he allegedly came by it innocently. On the other hand, if the jury had rejected defendant's version, there would have been eliminated from the case the sole evidence which could possibly have supported the inference that the theft had been committed by someone else, and the only inference which might have been drawn—although it need not have been—was that defendant was the thief. In either event, there simply was no issue in this case as to receiving stolen property.

The judgment of conviction should be affirmed.

FULD, J. (concurring). The court writes that a confession is admissible, even though obtained from the defendant "during a period of illegal detention following an unlawful arrest" (opinion, p. 507). I have stated my contrary views in *People* v. *Lane*, decided on November 30, 1961 (10 N Y 2d 347), and, in now joining joining in the majority's decision to affirm, I would have it noted that I do so only because I deem myself concluded by the holding in the *Lane* case.

Chief Judge DESMOND and Judges DYE, VAN VOORHIS, BURKE and FOSTER concur; Judge FULD concurs in a separate opinion.

Judgment affirmed.

Section 177 of the Code of Criminal Procedure

Sec. 177. In what cases allowed. A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When a person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it.

5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code.

Section 180 of the Code of Criminal Procedure

Sec. 180. Must state his authority, and cause of arrest, except where party is committed felony, or is pursued after escape. When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape.

Section 395 of the Code of Criminal Procedure

Sec. 395. Confession of defendant, when evidence, and its effect. A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

Memorandum Decision by Stephen W. Brennan, *U.S.D.J.*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES *ex rel.* CHARLES EVERETT,

Relator,

—vs—

HON. ROBERT E. MURPHY, Warden of Auburn State Prison, Auburn, New York,

Respondent.

MEMORANDUM DECISION

BRENNAN, *Judge*

The above named state court prisoner presents by mail a neatly prepared seventy-nine page petition requesting that a writ of habeas corpus issue from this court to test the legality of his present detention. The greater portion of the petition is taken up with the citation of cases and the discussion of legal principles. From its form and context, it would seem that the argumentative portion thereof has been taken from briefs filed by or in behalf of the petitioner in the appellate courts of the State. The petitioner also submits a transcript of the trial record. No claim is made that said record is insufficient for the purpose of this decision so that the factual allegations of the petition, together with such record, is sufficient for the independent appraisal thereof by this court.

Memorandum Decision by Stephen W. Brennan, U.S.D.J.

The petition presents a single basis for the requested relief. Same is best expressed by petitioner's allegation taken therefrom. "Defendant's petition presents only a federal question, namely whether he has been denied due process as guaranteed by the Fourteenth Amendment through the use at his trial of a coerced confession". Authorities are hardly necessary to support the recognized principle that coercion, in whatever form it appears, bars the use of a confession obtained thereby and that voluntariness is traditionally the test of admissibility. Although the factual background, upon which this decision must rest, is set out in detail in the opinion of the New York Court of Appeals, Peo. v. Everett, 10 N.Y. 2d 500, same will be briefly referred to below.

On the morning of July 3, 1959, Carmello Finocchiaro sustained injuries about the head which rendered him unconscious. Concededly the injuries were received as the result of an assault committed upon him at his place of business at Brooklyn N. Y. He died July 4, 1959 without regaining consciousness. The assault was unwitnessed. Suspicion was directed to the petitioner as the assailant by reason of the discovery that a watch, which had been worn by the deceased, had been pawned in a shop on July 3, 1959. The record of this transaction indicated that Charles Brown, a name sometimes used by the petitioner, had pawned the watch and received a loan thereon. On July 15, 1959, at about 10:50 P.M., the petitioner was approached by Detective O'Connor at or near the place he resided with a Mrs. Brown. He was told in substance that the detective had a warrant for his arrest on the charge of non-support

of his wife and family. Petitioner was thereafter taken to a police station or precinct where he was questioned by Detectives O'Connor and Bulger. Four other police officers appeared to be interested in the investigation but took no important part in the questioning or subsequent events. The petitioner denied any assault upon Finocchiaro but admitted the pawning of the watch which he claimed to have been obtained by him in a card game. During the course of the questioning, the petitioner was told by the officers that Finocchiaro was still alive; had not been badly hurt and in fact was downstairs in the same building. One of the officers indicated that he would talk to Finocchiaro with the apparent idea of obtaining a statement of his attitude towards the prosecution of his assailant. The officer left the room and returned after a short period, reporting that Finocchiaro had indicated that it was the petitioner who committed the assault upon him. The petitioner then admitted to the officers that he had gone to the place of business of the decedent on the morning of July 3rd to obtain a job, he having previously worked for said decedent. He was advised that no job was available and he then made up his mind to rob the deceased. He then obtained a stick which is variously described as a part of a 2 x 2 or 2 x 4, about eighteen inches long and awaited the return of the decedent by elevator to the ground floor. He then struck the decedent upon the head with the stick, took the watch from his wrist together with his wallet which contained $80. The wallet was later discarded.

The time consumed in the interrogation is in dispute. An assistant district attorney was sent for at 5:30 A.M.

and at about 7:30 A.M., petitioner's confession or statement was reduced to writing and signed. The petitioner was arraigned the next morning and charged with the crime of murder in the first degree. He was subsequently indicted. Three experienced trial counsel were assigned to protect his interest and he was brought to trial on February 29, 1960. By the verdict of a jury on March 10, 1960, he was found guilty of the crime of murder in the first degree, committed during the commission of a felony. In accordance with New York State procedure, the jury recommended life imprisonment. He was sentenced to be confined for the term of his natural life and is detained under the resulting commitment. An appeal was taken to the Appellate Division and the judgment was affirmed. Peo. v. Everett, 14 A.D. 2d 555. A further appeal was taken to the Court of Appeals which again affirmed the judgment. Peo. v. Everett, 10 N.Y. 2d 500. Certiorari was denied by the United States Supreme Court on June 25, 1962.

During the course of the trial, objection was made to the admissibility of petitioner's statements made to the police officers during the course of the interrogation and to a written confession obtained as the result thereof. The objections were based upon the contention that such evidence was induced by and the product of police coercion. A preliminary hearing as to the voluntariness of the admissions and subsequent question and answer statement, taken by the assistant district attorney, was held by the court. At the conclusion of the hearing, the objections were overruled. The admission and subsequent confession were received in evidence. At the same time, the trial judge speci-

fically instructed the jury that the question as to whether or not the admissions and confession were the voluntary acts of the petitioner was to be left to them as a question of fact.

It is unnecessary to detail the evidence given by the petitioner as to the occurrences which he claims resulted in his statements given as above. His testimony is to the effect that he was physically beaten by police officers and was threatened with further bodily harm. In substance, he testified that the questions propounded by the district attorney and the answers given by him thereto, as they appear in the confession, were for the most part untrue but were prompted by the treatment he had previously received at the hands of the police. All six police officers involved were called as witnesses and denied any and all acts of violence or threats upon or against the person of the petitioner. The assistant district attorney testified that no complaint was made to him by the petitioner at the time the question and answer statement was made. The receiving officer at the jail testified that the petitioner's only complaint was directed to an abrasion upon his right shin bone and that there was an indication of abnormality of the wrists. The attending doctor at the jail testified as to the existence of the abrasion, referred to above, and that the wrists appeared normal.

The case was submitted to the jury by the trial judge under adequate instructions to the effect that the burden of proving that the confession was voluntarily given was upon the prosecution and that the testimony referred to above created a question of fact which the jury must decide.

The jury was told unequivocally that unless the confession was found by the jury to be voluntary, it must be disregarded. It seems implicit in the jury's verdict that they found that the confession was voluntary.

Independent examination of the record indicates that the question of the voluntariness of the confession, received here, was fairly tried according to constitutional standards and that the verdict is a "permissible resolution of contradictions in evidence or conflicting inferences". Stein v. New York, 346 U.S. 156 at 182. The testimony of the petitioner as to physical brutality at the hands of the police and their denial requires no discussion since the following quotation from Thomas v. Arizona, 356 U.S. 390 at 402-403 eliminates same. "Time and again we have refused to consider disputed facts when determining the issue of coercion". This does not close the inquiry however, because even though "all testimonial conflict is settled by the judgment of the state court", Culombe v. Connecticut, 367 U.S. 568 at 603, it is the "totality of circumstances" that must serve as a guide to the decision of this application. Gallegos v. Colorado, 370 U.S. 49 at 55. We turn then to such facts and circumstances shown to exist which are urged would tend to overcome the will of the petitioner.

The petitioner is now a mature man of 41 years of age. His education ended in the fifth grade of an elementary school. He was experienced in the matter of law violations having been previously convicted of housebreaking, unlawful entry and third degree burglary. There is no evidence that he suffered from either mental or physical handicap. He was represented by experienced trial counsel. Petitioner seems to understand that the question of coercion by the

action of the police has been eliminated by the verdict of the jury and he appears to contend that the confession is barred as a matter of law because of the claimed illegality of his arrest, the deception used by the police in their statement that Finnochiaro was still alive and that certain items of wearing apparel had been illegally taken from his place of residence during the course of the interrogation. These contentions require little discussion.

It has long been recognized that police have the power to question those suspected of the commission of a crime. Culombe v. Connecticut, supra, at 571; Lyons v. Oklahoma, 322 U.S. 596 at 601; Watts v. Indiana, 338 U.S. 49 at 61-62. Even if the action of the detectives in taking the petitioner to the police station on July 15, 1959 constituted an arrest and was illegal, many decisions hold that a confession given during a period of unlawful detention is not thereby in itself rendered inadmissible. The contrary may be the rule imposed upon the federal courts by the decision in McNabb v. U.S., 318 U.S. 332 but it has not been extended as a requirement in state prosecutions. Culombe v. Connecticut, supra, at 600-601.

Petitioner does not appear to seriously urge that the deception practiced upon him by the statement of the police officer to the effect that he had a warrant in his possession at the time he was taken to the police station and that Finocchiaro was still alive and had identified the petitioner as his assailant outlawed the confession as a matter of law or was a factor in the matter of the admissions made. No case is cited which would be an authority for such a contention. The New York State Court of Appeals in its opinion in this case, Peo. v. Everett, supra, at page

507 disposes of this contention by brief discussion and the citation of New York State cases, together with the decision in U.S. ex rel. Caminito v. Murphy, 222 F. 2d 698. This court knows of no authority which holds that a misstated fact as to a claimed identification of the accused; the finding of finger prints; the confession of an accomplice or the location of the weapon alone would void a confession. Deception may be a factor to be considered in the overall question of voluntariness but a misstatement, lacking the element of a threat or involving confidential relationship such as found in Spano v. N.Y., 360 U.S. 315 or Leyra v. Denno, 347 U.S. 556 has never been held to vitiate a confession. This is not to be construed as an approval of deception as a means of police investigation. The circumstances here preclude a finding that the factual misstatements either overpowered or over influenced the will of the mature, competent and experienced petitioner.

It appears that in the course of the petitioner's interrogation that police officers went to the residence of petitioner and removed certain articles of wearing apparel therefrom. The circumstances do not clearly appear in the record. Even if the action was illegal, no prejudice resulted since the items were not offered or received in evidence.

It is the obligation of this court to make its own independent determination of whether or not the admissions and confessions here were the product of coercion. This is a well recognized principle restated in U.S. ex rel. Corbo v. LaVallee, 270 F. 2d 513 at 516. This requirement springs from the decision of Brown v. Allen, 344 U.S. 443. In this particular case, a reference to the opinion of the Court of Appeals in Peo. v. Everett, supra, could well be adopted

as the conclusion of this court after such examination. A reading of that opinion, together with the record here, reveals no vital flaw in the process of ascertaining the validity of the confession in the state court. After all the examination and evaluation of the state court record here, results in nothing more than the adoption of the state court decision as expressing the conclusion of this court. The seriousness of the crime, the length of the sentence and the fact that Justice Douglas was of the opinion that certiorari should be granted prompts this court not only to critically examine the record but to discuss at some length here the facts and law which justifies the conclusion reached.

The record here discloses none of the marks usually found where coercion exists. Petitioner labored under no mental or physical handicap. His mature age and experience in law violations belies the easy overpowering of his will by police action or interrogation. Here there was no wearing down of resistance by persistent or lengthly questioning. There is no evidence of denial of rest or refreshment. Positive evidence of physical injury is lacking. No unusual delay in arraigning the petitioner is shown.

This court holds that the trial record submitted is sufficient to enable this court to make an independent examination of the contentions raised in the present petition. Such examination has been made. It is concluded that a hearing based upon the allegations of the petition is unnecessary and that there is no showing of the denial of the fundamental rights of the petitioner in the matter of the receipt in the state court in evidence of the admissions and confession of the petitioner and that the application should be denied, and it is

Memorandum Decision by Stephen W. Brennan, U.S.D.J.

ORDERED the application be and the same is hereby denied and the Clerk is directed to file the petition without the requirement that fees therefor be prepaid.

STEPHEN W. BRENNAN
United States District Judge

Dated: August 15, 1962.

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 275—September Term, 1963.

(Argued January 20, 1964 Decided March 19, 1964.)

Docket No. 28213

UNITED STATES *ex. rel.* CHARLES EVERETT,

Relator-Appellant,

—v.—

ROBERT E. MURPHY, Warden, Auburn State Prison, Auburn, New York,

Respondent-Appellee.

Before:

FRIENDLY, SMITH and HAYS,

Circuit Judges.

Appeal by relator, state prisoner under life sentence on conviction in the County Court for Kings County, New York, of murder in the first degree, from an order of the United States District Court for the Northern District of New York, Stephen W. Brennan, *Chief Judge*, denying without hearing petition for writ of habeas corpus. Reversed.

EDWARD E. CLARK, New York, N.Y. (Anthony F. Marra, New York, N. Y., on the brief), *for relator-appellant.*

PHILIP WEINBERG, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York and Irving Galt, Asst. Solicitor General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge*:

Petitioner appeals *in forma pauperis* from denial without hearing of his petition for writ of habeas corpus in the United States District Court for the Northern District of New York, Stephen W. Brennan, *Judge*. We conclude that petitioner's conviction in the New York State courts was obtained through use of a confession not voluntary in nature, in violation of his right under the Fourteenth Amendment of the Constitution of the United States to due process of law, and reverse for issue of the writ.

By the verdict of a jury in the County Court, Kings County, New York, relator was found guilty of the crime of murder in the first degree committed during the commission of a felony. In accordance with New York procedure the jury elected to recommend clemency. The trial court accepted this recommendation and on May 10, 1960, sentenced relator to life imprisonment. The conviction was affirmed by the Appellate Division, Pette, *J.*, dissenting. *People* v. *Everett*, 14 App. Div. 2d 555, 218 N. Y. S. 2d 206 (2d Dep't. 1961). The New York Court of Appeals affirmed. *People* v. *Everett*, 10 N. Y. 2d 500, 180 N.E. 2d 556, 225 N. Y. S. 2d 193 (1962). In a concurring opinion Fuld, *J.*, stated that in his view the conviction should be reversed because a confession obtained "during a period

of illegal detention following an unlawful arrest", should not have been admitted in evidence. *Id.* at 510, 225 N. Y. S. 2d at 200 (concurring opinion). However, Judge Fuld deemed himself concluded by the rejection of this position in *People* v. *Lane*, 10 N. Y. 2d 347, 179 N. E. 2d 339, 223 N. Y. S. 2d 197 (1961).

The Supreme Court of the United States denied certiorari, Douglas, *J.*, believing that certiorari should have been granted. *Everett* v. *New York*, 370 U. S. 963 (1962). Relator thus exhausted his state remedies as required by 28 U. S. C. A. §2254. *Brown* v. *Allen*, 344 U. S. 443 (1953), *Fay* v. *Noia*, 372 U. S. 391 (1963).

Relator then applied, *pro se*, to the United States District Court for the Northern District of New York for a writ of habeas corpus. The District Court, Brennan, *J.*, found relator's confession voluntary and denied his application. It concluded that a hearing was unnecessary and limited its review to the state court record.

The circumstances of Everett's confession were as follows: On July 3, 1959 one Finocchiaro was found unconscious and bleeding from head wounds near an elevator on the ground floor of a Brooklyn loft building. He died the next day without regaining consciousness. On July 15, 1959 at 10:30 p.m. Everett was taken into custody in the doorway of his home in Brooklyn, where he was living apart from his wife and children, on the pretext that the arresting officer had a warrant from the Domestic Relations Court because Everett's children were hungry. No such warrant existed. The officer took Everett upstairs to Everett's apartment, but refused to allow Everett to use the phone. A squad car was called, and Everett was taken first to

Brooklyn East Headquarters then to the 87th Precinct, arriving between 11:30 and midnight. He was placed in a cell, then taken to an interrogation room. His shoes and glasses had been removed and he was fingerprinted and handcuffed. Police returned to his apartment and removed from the apartment some of his clothes. While the continuity of the questioning of Everett is somewhat in dispute, Detective O'Connor started questioning between 11:50 p.m. and 12:30 a.m. and continued at least to between 2:00 and 2:30 a.m. Detectives continued to talk with Everett until 5:30 a.m. when the Assistant District Attorney was called to take Everett's second confession, completed about 8:00 a.m. without warning of Everett's rights. The confession had first been obtained during the questioning by O'Connor, who told Everett that it was an assault and robbery, that Finocchiaro "was not hurt bad" and was downstairs. He represented that the victim was a little angry, but O'Connor could control him, that he could speak to him and that if Everett wanted O'Connor to help him he had better tell the truth. When Everett continued to deny doing it, O'Connor pretended to go to see Finocchiaro, and on his return told Everett that Finocchiaro said Everett did it and reiterated that unless Everett told the truth O'Connor would not help him. Thereupon, according to O'Connor, Everett confessed to striking and robbing Finocchiaro. Everett's version was that he was beaten with blackjacks and telephone books, punched in the stomach and kicked and thereafter confessed falsely. Although on a hearing the issue of brutality might be open, *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963), we do not now consider Everett's version since it is controverted by denials of physical abuse, and

supported, if at all, only by evidence of a bruised shin. See *U. S. ex rel. Williams* v. *Fay*, 323 F. 2d 65, 67 (2 Cir. 1963).

From the uncontroverted evidence, however, it is established that Everett was arrested illegally, held incommunicado and questioned extensively without counsel or warning of his right to counsel or his right to remain silent, and the confession followed upon deception and false promises of assistance if he should confess. The respondent argues that failure to raise the issue of deception in the criminal trial bars our consideration of the issue. The deception and the promises of help upon confession are plain on the record of the criminal trial, however, and are open to consideration in determining whether the conviction was obtained in violation of Everett's right to due process of law. *Townsend* v. *Sain*, *supra* at 316. The deception of Everett as to Finocchiaro's survival of the attack might be ignored if it stood alone. *U. S. ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, 700-701 (2 Cir. 1955). However, here it was used to make more plausible the promise of assistance to induce confession. Cf. *U. S. ex rel. Caminito* v. *Murphy*, *supra* at 700 n. 4. A confession induced by police falsely promising assistance on a charge far less serious than the police knew would actually be brought is not to be considered a voluntary confession. *U. S. ex rel. Williams* v. *Fay*, *supra*; *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963).

The judgment must therefore be reversed and remanded with instructions to issue the writ, ordering release of the prisoner unless afforded a new trial within a reasonable time.